92-603

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984 exempts from coverage facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(6). The question presented is whether the resulting regulatory distinction between facilities serving separately rather than commonly owned, controlled, or managed buildings is rationally related to a legitimate government purpose under the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners, respondents below, are the United States and the Federal Communications Commission. Respondents, petitioners below, are Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc. Respondents, intervenors below, are Spectradyne, Inc., National Cable Television Association, Inc., Wireless Cable Association, Inc., Southwestern Bell Corporation, and Hughes Communications Galaxy, Inc.

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The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 965 F.2d 1103. A previous opinion of the court of appeals in this case (App., *infra*, 8a-45a) is reported at 959 F.2d 975.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1992. On September 1, 1992, the Chief Justice extended the time for filing a petition to and

including October 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 602(6) of the Communications Act of 1934, as amended, provides (47 U.S.C. 522(6)):

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way * * * [.]

STATEMENT

The court of appeals in this case took the extraordinary step of striking down an Act of Congress under the Due Process Clause of the Fifth Amendment because the court concluded that a distinction drawn in the regulatory statute was not rationally related to any legitimate government purpose. The court's conclusion was not only wrong with respect to the particular statute before it—various reasons for the distinction can readily be conceived, as the dissent pointed out—but also reflected a fundamentally flawed approach to judicial review of regulatory statutes. This Court should grant certiorari not only because passing on the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), but also to correct the basic errors in the D.C. Circuit's approach to rational-basis review.

As the court of appeals noted, a "traditional cable system receives signals at a remote location and transmits them throughout a community via a network of wires that use local rights-of-way." App., *infra*, 11a. In contrast, a Satellite Master Antenna Television (SMATV) system is a facility that receives signals via satellite and retransmits them by wire from a satellite antenna to units in a multiple-unit building or building complex. *Ibid.*; see *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638, 7639 (1990) (describing SMATV systems). This case involves a challenge by SMATV companies to Congress's imposition of a franchising requirement upon cable facilities that physically interconnect separately owned, controlled, and managed buildings without using public rights-of-way. Under the plain language of 47 U.S.C. 522(6), such facilities are "cable systems" subject to franchising requirements under 47 U.S.C. 541(b)(1), while similar facilities that serve commonly owned, controlled, or managed buildings are not. The question presented is whether the court of appeals erred in holding that the distinction between separate and common ownership, control, and management lacks a rational basis

under the equal protection component of the Due Process Clause of the Fifth Amendment.

1. a. The Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, provides in pertinent part that "a cable operator" may not supply "cable service without a franchise." 47 U.S.C. 541(b)(1). A "cable operator" is one who provides service through "a cable system" (47 U.S.C. 522(4)), which is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. 522(6). The definition of "cable system," however, contains a "private cable" exemption for any "facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. 522(6)(B).

b. This action arises out of a Federal Communications Commission proceeding interpreting the term "cable system" as applied to SMATV facilities. The Cable Act's definition of "cable system" is substantially similar to the FCC's pre-Cable Act regulatory definition of "cable television system."[1] Compare 47 U.S.C. 522(6) with 47 C.F.R. 76.5(a) (1984). Of relevance here, the Act incorporated the regulatory "private cable" exemption, but added the proviso that denies exemption to facilities that "use[] any public right-of-way" 47 U.S.C. 522(6)(B). In view of the new proviso, the Commission initially construed Section 522(6)(B) to mean that "[w]hen multiple unit

[1] Prior to 1984, the Commission had since 1965 regulated cable communications pursuant to authority under the Communications Act of 1934. See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697 (1965); see also *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1143-1147 (2d Cir. 1981) (describing subsequent developments in cable regulation), cert. denied, 454 U.S. 1143 (1982). In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), the Court sustained the Commission's authority to issue cable regulations "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."

dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not * * * ownership, control or management." See *In re Amendments of Parts 1, 63, & 76*, 104 F.C.C.2d 386, 396-397 (1986).

Subsequently, however, the Commission issued the report and order at issue here, which revised and clarified its interpretation of the term "cable system" under the Act. See *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638 (1990). First, observing that Section 522(6) requires the use of "closed transmission paths," the FCC found that the term "cable system" does not include any facility that uses nonphysical transmission media (such as radio waves) to send signals to multiple-unit buildings. 5 F.C.C. Rcd. at 7638-7639. Second, the Commission determined that facilities serving only a single multiple-unit building by wire are not "cable systems." *Id.* at 7640-7641. Third, reversing its prior order interpreting the Act's "private cable" exemption, the Commission concluded that the exemption continues to include the "common ownership"

requirement[2] where facilities physically interconnect more than one multiple-unit building. *Id.* at 7641-7642.[3]

Thus, as the FCC interprets the statute, a SMATV operator who does not use public rights-of-way is subject to the Act if he serves separately owned multiple-unit dwellings, but not if he serves commonly owned multiple-unit dwellings. In addition, an otherwise covered SMATV operator who uses nonphysical means to transmit service is not covered, while one who uses physical means is.

2. a. Respondents[4] challenged the FCC's interpretation of the Cable Act on statutory and constitutional grounds. The court of appeals first rejected respondents' contention that the Cable Act does not cover SMATV facilities that serve separately owned, controlled, and managed buildings without crossing public rights-of-way. The court reasoned that, under the plain language of 47 U.S.C. 522(6), such facilities

[2] For purposes of simplicity, we refer to the requirement of "common ownership, control, or management" as the "common ownership" requirement. We also use the terms "commonly owned" or "separately owned" to refer to ownership, control, and management.

[3] In that regard, the Commission noted that a contrary interpretation would not only "render the 'common ownership, control, or management' portion of the statutory definition superfluous," but also eliminate an "aspect of the ['private cable'] exception [that] has been a part of our definition of a cable system from the beginning." 5 F.C.C. Rcd. at 7641.

[4] We use the term "respondents" to refer to petitioners below, Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc.

satisfy all of the criteria for coverage.[5] The court also found the facilities ineligible for the "private cable" exemption in Section 522(6)(B), which in plain terms requires "common ownership, control, or management" of the buildings served. App., *infra*, 20a-21a.

The court, however, found merit in respondents' claim that Section 522(6) violates the Fifth Amendment because there is no rational basis for imposing franchise requirements upon the covered SMATV facilities, while exempting (a) SMATV facilities that satisfy the "common ownership" requirement and use no public rights-of-way, and (b) distribution systems using nonphysical media to transmit signals to multiple-unit dwellings.[6] The court agreed with re-

[5] Respondents conceded that their facilities use "closed transmission paths" and associated equipment and supply "video programming." App., *infra*, 20a. And the court was unpersuaded by their contention that SMATV facilities do not serve "multiple subscribers within a community" (47 U.S.C. 522(6)) because service is limited to a particular group of buildings within a community. App., *infra*, 20a.

[6] Respondents also claimed that applying a franchising requirement to their cable operations violated the First Amendment. The court, however, found that claim unripe. App., *infra*, 25a-31a. The court acknowledged that 47 U.S.C. 541(b)(1) imposes a franchising requirement upon the SMATV operators, but noted that because of the local discretion over particular franchising duties, and "because the justification for [those] dut[ies] will depend on local facts," a pre-enforcement facial attack upon Section 522(6) under the First Amendment was unfit for present judicial determination. App., *infra*, 25a-27a. Finally, because it is unclear whether particular franchising systems would impose any substantial compliance costs, and because respondents may file anticipatory as-applied challenges, the court found that

spondents that no rational basis was evident "[o]n the record before [it]." App., *infra*, 34a. Finding that the traditional rationale for cable franchising—the use of public rights-of-way—did not apply to any of the pertinent classes of facilities, the court was unable to discern any alternative ground for distinction in the legislative record or "to imagine *any* basis" itself. *Id.* at 34a-35a. The court remanded the case to the FCC to create an administrative record of "legislative facts" suggesting a "conceivable basis" for the distinction. *Id.* at 36a.[7]

b. Chief Judge Mikva concurred in part and concurred in the judgment, but refused to join the court's equal protection analysis. App., *infra*, 36a-45a. Noting that the Cable Act bears a "very strong presumption of constitutionality" that may be sustained "by justifications in or out of the record," he found the challenged distinctions "entirely reasonable in light of the * * * Act's purposes." *Id.* at 40a-41a. With respect to the Act's distinction between facilities interconnecting buildings by wire, rather than nonphysical transmission media, the concurrence suggested that the classification serves Congress's objec-

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the availability of criminal and civil penalties for noncompliance with the Act (47 U.S.C. 501, 503) did not amount to hardship requiring immediate judicial review. App., *infra*, 30a-31a.

[7] Respondents also contended that the court should apply heightened scrutiny under the equal protection component of the Due Process Clause, because the classification at issue infringed fundamental First Amendment rights. App., *infra*, 31a. The court noted that if the Commission provided a rational basis for the classification, the court would have to decide whether a "fundamental rights" equal protection claim was ripe. *Id.* at 32a.

tive of promoting new technologies, by "creat[ing] an incentive for SMATV operators to switch from physical wiring to radio transmission so that they are exempt from regulation." *Id.* at 42a. As for the "common ownership" requirement in 47 U.S.C. 522(6)(B), the concurrence noted that Congress could have reasoned that a SMATV system "serving multiple buildings not under common ownership is similar to a traditional cable system," but that one "serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership [is] likely to be greater." App., *infra*, 43a. Chief Judge Mikva, however, concurred in the remand to allow the FCC "to put the classifications in context." *Id.* at 44a.

3. a. The FCC's report to the court of appeals endorsed the reasoning of the concurrence without offering additional supporting facts. See App., *infra*, 50a. After receiving the report, a divided court of appeals held the Cable Act unconstitutional, finding no rational basis for the "common ownership" requirement. *Ibid.*[8] While acknowledging that Chief Judge Mikva had suggested justifications for the requirement in his prior opinion, the court reasoned that it had "no basis for assuming" the state of facts that he had posited and found it dispositive that "the FCC has wholly failed to flesh th[ose] [justifications] out, or to suggest some alternative rationale." *Id.* at 4a. The court accordingly held that SMATV systems serving customers in buildings under separate

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[8] Although it had adverted to the issue in its initial decision, the majority did not address whether there was a rational basis for distinguishing facilities using physical transmission media from those using nonphysical media, such as radio waves. App., *infra*, 3a.

ownership, control, and management, were to be exempted from the Act's franchise requirements if they did not use public rights-of-way. *Id.* at 5a-6a.

b. Chief Judge Mikva dissented for the reasons advanced in his prior concurring opinion. App., *infra*, 7a.

REASONS FOR GRANTING THE PETITION

A divided panel of the court of appeals invalidated an Act of Congress regulating cable communications on the ground that the Act's classification of cable facilities lacks any conceivable rational basis. In so doing, the court repudiated Congress's judgment that the rationale for regulating cable facilities is generally diminished when a facility only serves dwelling units under common ownership, control, or management. The court's rejection of Congress's policy judgment (which also reflects longstanding FCC practice) was premised on basic errors in the application of rationality review under the equal protection component of Due Process Clause. In particular, contrary to this Court's decision, see, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 485 (1990); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), the majority effectively held that the rational basis for a distinction drawn by an Act of Congress must appear on a legislative or administrative record. The court of appeals' failure to adhere to this Court's precedents, moreover, caused it to invalidate a complex, thoroughly considered piece of socio-economic legislation, even though the justifications conceived by Chief Judge Mikva fall well within the range of "rough accommodations" (*Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 (1913)) that the democratic process is entitled to make under rationality

review. Before Congress's judgment about the regulatory relevance of common ownership, control, or management is held unconstitutional, this Court's review is warranted.

1. This Court's precedents leave no question that a statute's rationality need not be tested only on the basis of a legislative or administrative record. Rather, as this Court has made clear:

> Where * * * there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," * * * because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

United States R.R. Retirement Bd. v. *Fritz*, 449 U.S. at 179; see *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937); *Munn* v. *Illinois*, 94 U.S. 113, 132-133 (1877) ("For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed."). It is equally clear that where rationality review is undertaken, a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'" *Sullivan* v. *Stroop*, 496 U.S. at 485 (emphasis added) (quoting *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987)); see *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61,

78 (1911). Based on those precedents, the constitutionality of the Cable Act "can be sustained by justifications in or out of the record." App., *infra*, 40a (separate opinion of Mikva, C.J.).

The court of appeals did not follow that principle in this case. To be sure, in its initial decision remanding the case to the FCC, the court purported to "assume" that a "conceivable basis," rather than an "articulated basis," would be sufficient to sustain the Cable Act. App., *infra*, 35a. That assertion, however, cannot be squared with the court's own observation that "[*o*]*n the record before us*, we fail to see a 'rational basis'" for the classification. *Id.* at 34a (emphasis added). It is also difficult to reconcile the majority's asserted fidelity to this Court's precedents with its decision to remand the case to secure "additional 'legislative facts'" from the FCC. *Id.* at 36a.

In addition, although Chief Judge Mikva concurred in the remand—to give the Commission the opportunity "to put the classifications in context" (App., *infra*, 44a)—he nonetheless suggested plausible justifications for the Cable Act's classification scheme. *Id.* at 41a-43a. The FCC, moreover, endorsed his analysis on remand. *Id.* at 50a. Yet, when the case was returned to the court in the wake of the remand, the majority refused even to consider the merits of those stated justifications. To the contrary, the majority rejected the plausible assumption that cable facilities serving separately owned buildings are more likely to resemble traditional cable systems, because it had "no basis for assuming this." *Id.* at 4a. The court then dismissed Chief Judge Mikva's other suggested justifications because "the FCC has wholly failed to flesh these out." *Ibid.* In short, because it

was unwilling to sustain the constitutionality of an Act of Congress based on what it regarded as "naked intuition," the court invalidated the Cable Act (47 U.S.C. 522(6)) on the ground that no rational basis exists for the "common ownership" requirement. App., *infra*, 4a.[9]

2. Contrary to the court's decision, the statute is rational. As Chief Judge Mikva noted, reasonable assumptions about the practical effect of the "common ownership" requirement upon consumer welfare are sufficient to sustain the classification at issue.[10] First,

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[9] The court's initial decision had also raised the question of the Act's disparate treatment of SMATV facilities that interconnect buildings by wire and those that use nonphysical transmission media. App., *infra*, 34a-36a. Following remand, however, the court declined to reach the constitutionality of that distinction (*id.* at 3a), and it is therefore not presented here.

[10] Indeed, Chief Judge Mikva's supposition—that cable facilities serving only commonly owned buildings are more likely to be less in need of regulation—is not merely plausible, but is implicit in the FCC's consistent pre-Cable Act policy of exempting facilities from regulation on that basis. The Commission's first cable regulations, promulgated in 1965, exempted from coverage "any * * * facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 741 (1965). With revisions not material here, the "private cable" exemption was retained by the Commission in subsequent proceedings. See, *e.g.*, *Second Report & Order in Docket Nos. 14895, 15233, & 15971*, 2 F.C.C.2d 725, 797, 799, 801 (1966); *Cable Television Report & Order*, 36 F.C.C.2d 143, 214 (1972); *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 990-997 (1977). And it was part of the Commission's regulations when the Cable Act was enacted in 1984. See 47 C.F.R. 76.5(a)(2) (1984).

it stands to reason that in contrast with facilities serving separately owned units, a requirement of common ownership, control, or management imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities. The constraint on size gives each consumer of cable services greater leverage over the product supplied. Second, that leverage is likely to be enhanced by the fact that all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service. See App., *infra*, 43a (separate opinion of Mikva, C.J.) ("Congress could have reasoned * * * that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership is likely to be greater, so that the costs of regulation could outweigh the benefits.").[11]

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[11] It is assuredly true that some cable facilities serving commonly owned buildings will have more subscribers than some facilities serving separately owned buildings. However, it is equally true that "[i]n the area of economics and social welfare," a law does not violate equal protection principles "because the classifications * * * are imperfect." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). This Court has often acknowledged the reality that "[t]he problems of government are practical ones and may justify * * * rough accommodations." *Ibid.*; see, *e.g.*, *City of Dallas* v. *Stanglin*, 490 U.S. 19, 27 (1989); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175. It has accordingly emphasized that a classification is not invalid under the rational-basis test merely because it "is not made with mathematical nicety." *Dandridge* v. *Williams*, 397 U.S. at 485; see also *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) (classification may be "to some extent both underinclusive and overinclusive"). As a matter of common sense, it is more likely that commonly owned buildings will constitute a smaller cable market in which each tenant will have a greater voice and more influence on management; thus, it cannot be said that "the varying treatment" of facilities serving commonly, as opposed to separately, owned buildings is "so unrelated to * * * any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. at 97.

3. As compared with the majority's insistence that legislative justifications be "fleshed out" on an administrative record, Chief Judge Mikva's reliance on reasonable "intuition" is far more consistent with this Court's applications of the rational-basis test. A few examples illustrate the point.

In *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 108 (1949), this Court reviewed a municipal ordinance prohibiting the placement of advertisements upon trucks, except for "business notices upon business delivery vehicles * * * engaged in the usual business or regular work of the owner and not used merely or mainly for advertising." The Court rejected an equal protection challenge alleging that the distinction between general advertisement and self-advertisement was "not justified by the aim and purpose" of reducing distractions. 336 U.S. at 109. In sustaining that classification, the Court reasoned:

> The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

Id. at 110. In contrast with the majority's approach in this case, the Court's decision in *Railway Express* did not insist upon concrete "legislative facts" (App., *infra*, 36a) to support its supposition about "the nature and extent" of self-advertisements on vehicles. Nor did it have any administrative record to "flesh * * * out" (*id.* at 4a) its assumptions about the dissimilarity of the two pertinent kinds of advertising. Rather, because it was able to conceive of facts, the assumption of which would justify the classification, the Court sustained the law.

Similarly, in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), the Court upheld the rationality of an Oklahoma law that prohibited opticians from fitting or duplicating glasses without a prescription, but exempted sellers of "ready-to-wear" glasses. In rejecting the opticians' equal protection claim, the Court explained:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (citations omitted). Applying those principles, the Court upheld the contested classification. *Ibid.* Contrary to the decision here, *Lee Optical* imputed rationality to the process of legislative line drawing when the evidence of record did not definitively foreclose the existence of plausible facts supporting it.

More recently, the Court in *Vance* v. *Bradley*, 440 U.S. 93 (1979), strongly reaffirmed that principle in rejecting an equal protection attack upon a statute requiring members of the Foreign Service to retire by the age of 60. In response to the plaintiffs' apparent contention that the classification could be sustained only upon submission of "empirical proof that health and energy tend to decline somewhat by age 60" (*id.* at 110), the Court responded:

> [T]his case, as equal protection cases recurrently do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Id. at 110-111. Finding the facts to be "arguable," the Court held that the legislative judgment reflected in the statute was "immun[e] from constitutional attack" under rationality review. *Id.* at 112.

The next year, in *United States R.R. Retirement Bd.* v. *Fritz*, *supra*, the Court upheld the Railroad Retirement Act of 1974, which prospectively eliminated a railroad retiree's ability to collect both social security and railroad retirement benefits. The case arose because the Act grandfathered dual benefits for those who had between 10 and 25 years of railroad employment, but only if the employee worked

for a railroad in 1974 or had a "current connection" with a railroad as of the transitional date of the Act (December 31, 1974) or the date of his actual retirement thereafter. 449 U.S. at 172-174. After reaffirming its general reluctance to invalidate a social or economic statute because it is "unwise or unartfully drawn" (*id.* at 175), this Court upheld the Act's "current connection" test on the ground that "Congress could assume that those who had a current connection with the railroad industry when the [Railroad Retirement] Act was passed in 1974, or who [had] returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the * * * Act was designed." 449 U.S. at 178. Because a plausible ground could be conceived for the challenged classification, the Court declined to overturn Congress's policy judgment—even though Congress's apparent factual assumptions were neither explicitly stated nor empirically verified.

This Court's decisions in *Railway Express*, *Lee Optical*, *Vance*, and *Fritz* faithfully apply the settled principle most recently reiterated in *Sullivan* v. *Stroop*—that an economic classification does not violate equal protection "if any state of facts reasonably may be conceived to justify it." 496 U.S. at 485.[12] The decisions of this Court, moreover, clearly

[12] For other decisions implicitly or explicitly applying that principle, see, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 599-600 (1987) (upholding statute reducing welfare payments for families receiving child support, based upon Congress's "assumption that child support payments * * * are generally beneficial to the entire family unit" and upon "the common sense proposition" that shared expenses reduce per capita cost of living with others); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 315-316 (1976) (upholding law requiring police to retire at age 50, because "[t]here is no indication that [the statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute"); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) (sustaining exemption of products from prohibition against Sunday sales because "a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day," and because the record "is barren of any indication that this apparently reasonable basis does not exist").

instruct that, where economic legislation is involved and the rational-basis standard applies, a reviewing court must indulge the democratic process by crediting plausible, but unverified, assumptions and by relying on common sense, even when it is unsupported by legislative or administrative findings of fact. In contrast, the court of appeals never addressed the merits of the plausible, common sense justifications advanced in the separate opinion and endorsed by the FCC. Rather, it refused to "assume" unverified facts or to credit any rationale that was not "fleshed out" in an administrative record. In applying the rational-basis test inconsistently with this Court's decisions, the majority gave far too little weight to the presumption of validity that attaches to Acts of Congress under the rational-basis test, see, *e.g.*, *Lyng* v. *International Union, United Automobile Workers*, 485 U.S. 360, 370 (1988), and far too much weight

to its own conception of sound reasons for requiring cable franchising. App., *infra*, 34a-35a.[13]

4. "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). But that judicial assault on democratic institutions ended long ago, when the Court returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 425 (1952) ("if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision"). For over a generation, this Court's decisions have proceeded from the central premise that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along

[13] Specifically, the majority emphasized that the use of public rights-of-way has been a traditional justification for allowing local franchising of cable, and that none of the facilities here uses any public right-of-way. See App., *infra*, 34a-35a. It is true that a cable facility's use of public rights-of-way has been a crucial determinant in allocating responsibility over cable to local governments. See, *e.g.*, *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 808-811 (D.C. Cir. 1984). However, it is one thing to say that the use of public rights-of-way is a legitimate justification for requiring local franchising of cable services, and quite another to conclude (as the court of appeals did here) that there can be no other conceivable interest that will support a local franchising requirement.

suspect lines." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

This philosophy of limited judicial power supplies the framework for evaluating socio-economic legislation, such as the Cable Act, under the equal protection component of the Due Process Clause of the Fifth Amendment. See, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175-176; *Vance* v. *Bradley*, 440 U.S. at 102; *Flemming* v. *Nestor*, 363 U.S. at 611. Properly applied, the rational-basis test ensures that federal courts have "no power to impose * * * their views of what constitutes wise economic or social policy." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175. Under that test, if there are "plausible reasons" (*id.* at 179) for a classification—that is, if "any state of facts reasonably may be conceived to justify it" (*Sullivan* v. *Stroop*, 496 U.S. at 485)—Congress's policy determinations prevail.

Given the plausible justifications set forth by the dissenting judge in this case and concurred in by the FCC, Congress's judgment about franchising facilities serving separately owned units was essentially "one of policy, and this kind of policy, under our constitutional system, ordinarily is to be 'fixed only by the people acting through their elected representatives.'" *Vance* v. *Bradley*, 440 U.S. at 102.[14] Con-

[14] As Chief Judge Mikva noted, "The Cable Act is a large and complex piece of socioeconomic legislation, an effort to establish a comprehensive regulatory scheme for the cable industry, a product of public hearings, private negotiations, and compromise. SMATV operators, the [respondents] in this suit, participated actively in the process and, in fact, did quite well." App., *infra*, 40a-41a. It is true that on the matter at issue here, respondents "lost a political battle in which

trary to the majority's decision, Congress's policy judgment does not have to be empirically justified to a federal court. A federal court's "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" *Id.* at 111. Legislatures, in short, are entitled to speculate when addressing regulatory problems, and the rational-basis test—properly applied—ensures that the judiciary will not unduly circumscribe such efforts.

Because the court of appeals invalidated an Act of Congress that easily satisfied the standard of rationality required by this Court's decisions, further review is warranted. There is, however, an additional reason to correct the court of appeals' error. Inasmuch as the D.C. Circuit's docket disproportionately involves complex regulatory schemes, it is particularly important that the court assess the validity of the classifications drawn by Congress under the appropriate standard of review. The court of appeals' published decision invalidating a provision of the Cable Act, 47 U.S.C. 522(6), as irrational cannot

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[they] had a strong interest." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. "[B]ut this is neither the first nor the last time that such a result will occur in the legislative forum" (*ibid.*), and "[t]he Constitution presumes that, absent some * * * antipathy [to the burdened parties], even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97.

be squared with this Court's decisions and therefore warrants further review.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1992

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[15] We note that on October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. That statute, however, does not affect the definition of "cable system" here at issue.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATIONS, INC.,
MAXTEL LIMITED PARTNERSHIP,
PACIFIC CABLEVISION AND
WESTERN CABLE COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

SPECTRADYNE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
WIRELESS CABLE ASSOCIATION, INC.,
SOUTHWESTERN BELL CORPORATION AND
HUGHES COMMUNICATIONS GALAXY, INC.,
INTERVENORS

Petition for Review of an Order of the
Federal Communications Commission

[Filed June 9, 1992]

Upon Return of Record

Before: MIKVA, Chief Judge, EDWARDS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed *Per Curiam*.

Dissenting opinion filed by Chief Judge MIKVA.

Per Curiam: This is our second decision on the instant petitition for review of an FCC rule, the Cable Definition Rule, promulgated pursuant to the Cable Act. In the first decision, *Beach Communications, Inc. v. FCC*, No. 91-1089 (D.C. Cir. Mar. 6, 1992) ("*Beach I*"), we remanded the record to the FCC. The record has now been returned. We hold that the Cable Act violates the equal protection component of the Fifth Amendment, insofar as it imposes a discriminatory franchising requirement, and vacate the Cable Definition Rule in relevant part.

The background of this case is explained in detail in *Beach I*, so we will not repeat it here. To briefly summarize, petitioners operate or plan to operate *external, quasi-private* SMATV facilities: where wires or other closed transmission paths interconnect separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way. The Cable Definition Rule construes the statutory term "cable system" to include such facilities, but to exclude both *internal* facilities (where wires do not interconnect separate buildings or use public rights-of-way) and *wholly private* facilities (where a single building or a group of commonly-owned, controlled or managed buildings are served, and the wires do not use public rights-of-way). Section 621(b)(1) of the Cable Act requires the operator of a "cable

system" to obtain a local franchise.[1] Petitioners challenge this requirement on equal protection grounds.

Beach I held that the Cable Act clearly defined an *external, quasi-private* SMATV facility as a "cable system." We also ruled that the minimum-scrutiny equal protection issue was ripe, and remanded the record for the FCC to consider whether some "rational basis" justified the distinction between this kind of facility and the facilities exempted by the Cable Definition Rule. The equal protection issue could not be avoided, we explained, because the Cable Act clearly excluded *wholly private* facilities from the definition of a "cable system." We left open the question whether that statutory term might be construed to include *internal* facilities that were not *wholly private*.

The FCC has now returned the record, and has failed to provide any justification for the challenged distinction. We therefore decide that the Cable Act is unconstitutional in part. Specifically, we decide that the statute violates the equal protection component of the Fifth Amendment insofar as it requires local franchises for *external, quasi-private* SMATV facilities and exempts *wholly private* facilities from this requirement. Thus, we need not consider whether differential regulation of *external, quasi-private* SMATV facilities and *internal* facilities is also unconstitutional. This latter issue would entail a fur-

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[1] More precisely, § 621(b)(1) states: "Except to the extent provided [by a grandfather clause], a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1) (1988). The terms "cable operator," "cable service" and "franchise" are defined in § 602 of the Cable Act.

ther, and now unnecessary, exercise in statutory construction.

We can conceive[2] of no reason why an *external, quasi-private* SMATV facility, but not a *wholly private* facility, should be subject to local cable franchising. Neither uses a public right-of-way.[3] Our colleague has suggested that an *external, quasi-private* facility is more "similar to a traditional cable system." *Beach I*, slip op. at 6 (Mikva, C.J., concurring in part and concurring in the judgment). We have no basis for assuming this. Furthermore, the mere impression of "similarity," without more, does not amount to a "rational basis." It does not amount to a reasoned justification in terms of *some* public purpose. To be sure, our colleague also offers putative justifications. *See id.* But the FCC has wholly failed to flesh these out, or to suggest some alternative rationale: "[T]he Commission . . . reports to the Court that it is unable to provide additional 'legislative facts,' beyond those provided by Judge Mikva in his concurring opinion." Report of Respondent Federal Communications Commission in Response to Opinion of March 6, 1992, at 1-2. We are now convinced that the impression of "similarity" is just that: a naked intuition, unsupported by conceivable facts or policies. *Cf. Zobel v. Williams*, 457 U.S. 55 (1982) (in-

[2] When applying the rational basis test, the Supreme Court has often stated that a classification may be sustained if any conceivable justification would support it. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 601 (1987).

[3] As we have already explained at length, "[t]he fact that cable television uses public rights-of-way has been the predominant rationale for local franchising." *Beach I*, slip op. at 23.

validating as irrational an Alaska dividend program that distributed benefits proportionately to an adult state citizen's duration of residency).

There remains the question of remedy.

> Where a statute is defective because of underinclusion, . . . there exist two remedial alternatives: a court may either declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.

Califano v. Westcott, 443 U.S. 76, 89 (1979) (internal quotations and brackets omitted).[4] The Court has further explained that, "[a]lthough the choice between extension and nullification is within the constitutional competence of a federal district court, . . . the court should not, of course, use its remedial powers to circumvent the intent of the legislature." *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (internal quotations omitted). But the Cable Act places a *burden* on petitioners rather than denying

[4] Overinclusive classifications "may of course be challenged as denying equal protection." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-4, at 1450 (2d ed. 1988). However, as far as we are aware, neither the Supreme Court nor the D.C. Circuit has explicitly addressed the problem of "extension" versus "nullification" as a remedy for the violation of equal protection by an overinclusive statute. Justice Harlan mentioned the problem in his *Welsh v. United States* concurrence, which is the source of modern remedial doctrine concerning underinclusive statutes. In passing, Harlan suggested that "cases of alleged 'overinclusion'" do not "present[] the remedial problem that arises in [an underinclusion] case.'" *Welsh v. United States*, 398 U.S. 333, 363 n.15 (1970) (Harlan, J., concurring in the result).

them *benefits*, and is *overinclusive* rather than *underinclusive* in that this burden does not serve the Act's purposes. Assuming, *arguendo*, that "extension" (extending the franchise requirement to include *wholly private* facilities) rather than "nullification" (exempting *external, quasi-private* SMATV facilities from that requirement) remains within our "constitutional competence," we would have no basis for choosing "extension." Such a remedy would surely circumvent Congress's intent, because *neither* kind of facility uses a public right-of-way.

Rather, we avoid the franchise requirement, insofar as it covers petitioners and similarly situated SMATV operators. The severability provision at 47 U.S.C. § 608 (1988), which governs the Cable Act, authorizes this narrowly focussed remedy: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." Specifically, we declare that the operators of *external, quasi-private* SMATV facilities are not required to obtain franchises pursuant to § 621(b)(1) of the Cable Act,[5] as the Act currently stands, and we direct the FCC to amend the Cable Definition Rule accordingly.

If we have misunderstood congressional intent in our construction of the Act and its underlying pur-

[5] Petitioners do not challenge any feature of the Cable Act except the franchise requirement in § 621(b)(1). We need not decide at this point whether other statutory requirements for "cable systems," including *external, quasi-private* SMATV facilities, are severable from this one. *See, e.g.*, 47 U.S.C. § 559 (1988) (prohibiting transmission of obscene matter over any "cable system").

poses, we have no doubt that Congress will act to remedy the situation.[6]

MIKVA, *Chief Judge, dissenting*: For the reasons expressed in my concurring opinion in *Beach Communications, Inc. v. FCC*, No. 91-1089 (D.C. Cir. Mar. 6, 1992), I dissent.

[6] The FCC has advised:

> The Court should be aware that significant cable legislation is before Congress now, *see, e.g.*, H.R. 4850, 102d Cong., 2d Sess. (1992), and that Congress in the context of considering that legislation will have an opportunity to revise the definitional provisions of the 1984 Act if it chooses. Some interested parties have brought the Court's decision in this case to the attention of the relevant committees and have suggested legislative language to address the equal protection question identified in the majority opinion in this case.

Report of Respondent Federal Communications Commission in Response to Opinion of March 6, 1992, at 7.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATIONS, INC.,
MAXTEL LIMITED PARTNERSHIP,
PACIFIC CABLEVISION AND
WESTERN CABLE COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

SPECTRADYNE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
WIRELESS CABLE ASSOCIATION, INC.,
SOUTHWESTERN BELL CORPORATION AND
HUGHES COMMUNICATIONS GALAXY, INC.,
INTERVENORS

Petition for Review of an Order of the
Federal Communications Commission

[Filed Mar. 6, 1992]

Before: MIKVA, *Chief Judge*, EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate concurring statement filed by *Chief Judge* MIKVA.

EDWARDS, *Circuit Judge*: This case involves a challenge to a Federal Communications Commission ("FCC" or "Commission") construction of the Cable Communications Policy Act of 1984 ("Cable Act"). According to the FCC, the Cable Act covers Satellite Master Antenna Television ("SMATV") facilities with wires interconnecting separately owned, controlled and managed multiple-unit dwellings, even when the wires do not use public rights-of-way. SMATV companies petition for review, arguing that the Commission has misinterpreted the statute, and that local franchising (as may be required pursuant to the Cable Act) violates their First Amendment and equal protection rights.

We reject petitioners' statutory challenge, for the plain language of the Cable Act defines the disputed SMATV facilities as "cable systems," and that definition is consistent with the legislative history as well as the preexisting regulatory regime.

As for petitioners' First Amendment claim, we find it unfit for judicial decision under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and therefore unripe. The Cable Act requires every cable operator to have a local franchise, but gives each locality the discretion to create its own franchising regime. We cannot find the statute unconstitutional on its face, because we do not know whether con-

ditions in any given locality will justify a burden on petitioners' speech, nor do we know what kind of burden will need to be justified, nor the appropriate First Amendment standard. Thus, we cannot assess any claim of First Amendment infringement absent an as-applied challenge to some specific franchising requirement. Since petitioners present no such claims in this appeal, we dismiss this portion of the case as unripe.

We cannot dispose of petitioners' equal protection challenge so easily, for it raises a "purely legal" issue that is ripe for judicial review and, also, poses a serious constitutional problem. Normally, in considering the constitutionality of a statute, we seek a reasonable reading that avoids constitutional infirmities. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). Here, however, we face seemingly insurmountable difficulties in achieving this goal. Under the FCC's construction of the Cable Act, a video transmission facility is not a "cable system" if the facility's wires are internal to multiple-unit dwellings, or if the interconnected buildings are commonly owned, controlled or managed and the wires do not use public rights-of-way. We see no "rational basis" for the distinction between these two types of exempted facilities and SMATV facilities that interconnect separately owned, controlled and managed buildings without using rights-of-way. Absent some rational basis for this statutory distinction, petitioners' equal protection challenge may have merit. Because the record is lacking on this point, we remand for supplementation by the FCC.

I. BACKGROUND

The traditional cable television system receives signals at a remote location and transmits them throughout a community via a network of wires that use local rights-of-way. The Cable Act provides the framework for local franchising of this sort of system. SMATV is smaller than traditional cable systems, for it usually involves a single building or building complex that is wired to a satellite antenna. The question here is whether the Cable Act covers a SMATV facility located wholly on private property and, if so, whether the Constitution permits such coverage. The regulatory history of cable franchising helps clarify this question, and we briefly review it.

Prior to the Cable Act, the FCC regulated cable television without a specific governing statute. The Commission had evolved a dual regime for "cable systems," which were defined as:

> non-broadcast facilit[ies] consisting of a set of transmission paths and associated signal generation, reception, and control equipment . . . but such term shall not include . . . any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. § 76.5(a) (1984). State and local governments were given the task of franchising cable systems, while the FCC had exclusive jurisdiction over signal carriage, technical standards and other operational matters. *See generally New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807-11 (D.C. Cir. 1984) (general history of dual regime). This was so because "conventional licens-

ing would [have] place[d] an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways . . . ." *Cable Television Report & Order*, 36 F.C.C.2d 143, 207 (1972).

The FCC's original definition of cable systems included the so-called "private cable" exemption, for facilities that served "only subscribers in one or more multiple unit dwellings under common ownership, control, or management." This provision was originally designed for Master Antenna Television ("MATV") systems, which receive and redistribute normal broadcast signals. On its face, 47 C.F.R. § 76.5(a) exempted two kinds of MATV systems. The first was a system where the wires were confined to a single multiple-unit dwelling: for example, a MATV antenna on the roof of an apartment house, wired only to apartments in that building. The second was a system where the wires connected a group of buildings that were commonly owned, controlled or managed: for example, a MATV facility for a single apartment complex. Conversely, the language did *not* cover a system interconnecting apartment buildings that were separately owned, controlled or managed. And, indeed, the FCC interpreted its definition of a "cable system" to exempt the first two kinds of MATV facilities, and to include the third. *See generally In re Amendment of Part 76*, 54 F.C.C. 2d 824, 826-27 (1975) (notice of rulemaking); *In re Amendment of Part 76*, 63 F.C.C.2d 956, 990-97 (1977).

During this pre-Cable Act period, new alternatives to traditional cable television began to emerge. One such alternative was SMATV; another was multi-

point distribution ("MDS") via microwaves. In 1978, the FCC preempted local franchising of a MDS system that beamed microwaves from the Empire State Building to rooftop antennae. *See In re Orth-O-Vision*, 69 F.C.C.2d 657 (1978), *reconsideration denied*, 82 F.C.C.2d 178 (1980), *review denied sub nom. New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982). Several years later, in *In re Cable Dallas, Inc.*, 93 F.C.C.2d 20 (1983), the FCC decided that a SMATV system serving a "cluster[] of apartment buildings, . . . composed of buildings not under common ownership, management, or control," *id.* at 21, was a "cable system." However, the Commission ruled that the franchising of a single-building SMATV system was preempted. *See In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). In the latter ruling, the FCC stated that "SMATV systems which are defined as cable television systems by this Commission are not under scrutiny here," 95 F.C.C.2d at 1224 n.3, and this circuit noted the proviso in affirming the Commission, *see New York State Comm'n*, 749 F.2d at 807 n.1.

Although the FCC did not say so explicitly, the pattern of decisions in *Orth-O-Vision*, *Cable Dallas* and *Earth Satellite Communications* was consistent with the pattern for MATV. A MDS or SMATV facility for multiple-unit dwellings was a "cable system" if and only if the wires were "external" (*i.e.*, served to connect separate buildings) and the interconnected buildings were not commonly owned, controlled or managed.

Congress promulgated the Cable Act to establish, *inter alia*, "a national policy concerning cable communications," "guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," and "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521 (1988). Section 621(b)(1) of the Act requires every cable operator to have a local franchise,[1] and section 602(6) defines a "cable system" as follows:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

47 U.S.C. § 522(6) (1988); *see also* 47 C.F.R. § 76.5 (a) (1990) (same definition). This definition incorporated *verbatim* the Commission's prior "private cable" provision, with one important change: the final proviso that a facility is exempted "unless such facility or facilities uses any public right-of-way."[2]

The right-of-way proviso, on its face, makes the use of public rights-of-way a *sufficient* condition for a "cable system," not a *necessary* condition. However, the FCC initially interpreted § 602(6) to mean that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management." *In re Amendment of Parts 1, 63 & 76*, 104 F.C.C.2d 386, 396-97 (1986), *modifying on other grounds Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18,637 (1985). Soon thereafter, the FCC reconsidered the meaning of § 602(6). *See Definition of a Cable Television Sys.*, 54 Fed. Reg. 14,253 (1989) (notice of rulemaking). After hear-

[1] "Except to the extent provided [by a grandfather clause], a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1) (1988). A franchise is defined as "an initial authorization, or renewal thereof . . . , issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(8) (1988). A "franchising authority" is "any governmental entity empowered by Federal, State, or local law to grant a franchise." *Id.* § 522(9). We use the term "local franchise" to mean "franchise from a franchising authority." *See* H. REP. No. 934, 98th Cong., 2d Sess. 45 (1984) ("In several states . . . the franchising process includes approval of a franchise by a state agency as well as by a local government. [Congress] intends that in such cases the term 'franchising authority' shall include these state agencies, in addition to any local government body with authority to grant a franchise, including a military authority if authorized to grant such a franchise.").

[2] The Cable Act also omitted the phrase "will serve" from the regulatory exemption, which had covered a "facility that serves or *will serve* only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" (emphasis added).

ing comments from interested parties, the FCC issued a new interpretation. *See In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638 (1990).[3]

The rulemaking covered video transmission facilities for multiple-unit dwellings.[4] A "cable system" is defined by § 602(6) as using a "closed transmission path[]," and the FCC decided that this term included only wire and other *physical* connections, not the microwave transmission used by MDS. *See id.* at 7638-39. Moreover, a facility would "use[] any public right-of-way" for purposes of the proviso in § 602(6)(B) only if a wire or some other "closed transmission path" impinged upon the right-of-way. *See id.* at 7641-42. The FCC then considered whether a video facility would constitute a "cable system," even if its "closed transmission paths" did not transect rights-of-way. Here, the Commission relied upon the plain language of § 602(6)(B) as well as its regulatory history.

> [The FCC's decisions prior to the Cable Act] made clear that the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system. . . . [Where] buildings were connected by radio alone, the Commission did not treat the facilities as cable systems, even where the buildings were not commonly-owned

[3] *See also Definition of a Cable Television Sys.*, 56 Fed. Reg. 1931 (1991) (summary of rulemaking).

[4] The FCC already had considered whether the Cable Act covers a facility for single-unit dwellings, e.g., a SMATV system for a mobile home park or a complex of vacation homes. *See In re Mass. Community Antenna Television Comm'n CSR-2997*, 2 F.C.C. Rcd. 7321 (1987).

> and thus were not within the exemption for multiple-unit dwellings.

Id. at 7640. Conversely,

> [w]here . . . buildings are interconnected by closed transmission paths, Commission precedent and the plain language of the statutory exemption make clear that the services must be considered cable systems unless (1) the buildings are commonly owned, controlled, or managed and (2) the facilities do not use any public rights-of-way.

Id. at 7641 (citation omitted).

Thus, the FCC adopted the following "general principles . . . [that] should provide ample guidance in interpret[ing]" § 602(6).

> [F]acilities must be interconnected by physically closed or shielded transmission paths to meet the statute's threshold requirement for a cable system. Use of radio or infrared transmissions alone does not meet this threshold criterion. The use of wire or cable exclusively within the premises of multiple unit buildings . . . also does not fall within the statutory definition. . . . However, where a wire or cable is used to interconnect MATV or SMATV equipped buildings, the system is a cable facility unless the several buildings are commonly owned, controlled, or managed and the system's physically closed interconnection paths do not use a public right of way.

Id. at 7642-43. We will refer to this set of principles as the "Cable Definition Rule."[5]

[5] The word "rule" is not meant to imply that *In re Definition of a Cable Television System* creates a substantive rule. For

The instant case is a petition for review of the Cable Definition Rule. The petitioners are SMATV companies, and their facial challenge is focused on one aspect of the rule: that a SMATV facility with wires or other closed transmission paths interconnecting separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way, is a "cable system." We will call this kind of SMATV facility an "*external, quasi-private*" facility.[6] Conversely, we use the term "*internal*" to mean a facility where wires do not interconnect separate buildings or use public rights-of-way, and "*wholly private*" to mean a facility that serves a single building or a group of commonly-owned, controlled or managed buildings and the facility's wires do not use public rights-of-way.[7] The *internal* and *wholly private* systems are the two kinds of facilities that are *not* cable systems under the Cable Definition Rule. Petitioners argue that the Commission has incorrectly interpreted § 602(6) to cover *external quasi-private* SMATV, and that the Cable Definition Rule violates their First Amendment and equal protection rights by requiring them to obtain local franchises.[8]

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purposes of this petition, we need not decide whether the FCC's "general principles" are interpretative or substantive.

[6] Petitioners have standing because they currently operate *external, quasi-private* SMATV facilities or have concrete plans to operate such facilities.

[7] The two categories are not mutually exclusive.

[8] The FCC did not address these constitutional issues in proposing or promulgating the Cable Definition Rule. Petitioners need not have raised the issues below. *See Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 n.3 (D.C. Cir. 1989) (no exhaustion requirement for facial constitutional challenge to FCC action), *cert. denied*, 493 U.S. 1035 (1990).

Petitioners do not challenge any feature of the Cable Act or FCC regulations except local franchising. Specifically, they do not challenge any direct federal requirement for cable systems.

II. Analysis

A. *The Statutory Challenge*

We reject petitioners' statutory challenge to the Cable Definition Rule. Section 602(6) of the Cable Act *does* cover an *external, quasi-private* SMATV system. This finding concludes our inquiry on the statutory challenge, because, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). It is true that the Cable Definition Rule raises a special case, because the rule poses a serious equal protection problem. *See* section II.B.2. *infra*. And, normally, a court is obliged to construe a statute to avoid constitutional problems. *See DeBartolo*, 485 U.S. at 575. The difficulty here is that there is no reasonable alternative construction for the disputed language in the statute; and we have no authority to ascribe a construction to a statute that is "plainly contrary to the intent of Congress." *Id.* As the FCC found, the plain language of § 602(6) defines an *external, quasi-private* SMATV facility as a "cable system," and the legislative history does not contradict this plain meaning.

Section 602(6) has a definitional clause and then the private-cable exemption, § 602(6)(B). The defi-

nitional clause reads as follows: "the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(6) (1988). It is clear that this definitional clause covers *external, quasi-private* SMATV. Petitioners do not dispute that an *external, quasi-private* SMATV facility has "closed transmission paths," as well as the "associated . . . equipment," and is "designed to provide cable service which includes video programming." Rather, they argue that such a facility does not provide cable service "to multiple subscribers within a community," because *external, quasi-private* SMATV serves only the residents of a particular group of buildings, not the entire locality. But the definitional clause is not reasonably interpreted to require that a "cable system" must interconnect a whole "community." The words "within a community" do not support this interpretation, whatever else they mean. Otherwise, a cable operator could evade the Cable Act by neglecting to wire some small fraction of local dwellings. Moreover, petitioners' reading of the definitional clause makes surplusage of the private-cable exemption. A "facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management," 47 U.S.C. § 522(6)(B) (1988), will rarely, if ever, comprise the entire "community."

Thus, an exemption for *external, quasi-private* SMATV cannot fairly be ascribed to the definitional clause of § 602(6). Nor can it be ascribed to the private-cable exemption. Petitioners' argument, here,

is that the phrase "under common ownership, control, or management" should be read to mean that, as long as each apartment building is *itself* under common ownership, control or management, the *complex* of buildings need not be commonly owned, controlled or managed. The problem with this reading of the private-cable exemption is that it completely distorts the literal terms of the statute.

Because the plain language of § 602(6) covers *external, quasi-private* SMATV, legislative history has little weight.[9] As we stated in *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988): "The general interpretive principle—a reluctance to rely upon legislative history in construing an *unambiguous* statute—is of especial force where, as here, resort to legislative history is sought to support a result *contrary* to the statute's express terms." 823 F.2d at 1568 (emphasis in original). To be sure, this interpretive principle does not apply if "the plain language of the statute would be lead to blatantly absurd consequences." *Avco*

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[9] Petitioners also argue that the structure of the Cable Act precludes the FCC's interpretation of § 602(6), or at least makes that provision ambiguous. However, their argument is frivolous. First, they point to § 621(a)(2), which states that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2) (1988). But this provision surely does not imply or require that cable systems use rights-of-way. Second, petitioners claim that § 621(a)(3), the "redlining" provision, requires the cable operator to wire an entire community. In *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), we specifically rejected this claim: "The [provision] on its face prohibits discrimination on the basis of income; it manifestly does not require universal service." 823 F.2d at 1580.

Corp. v. United States Dep't of Justice, 884 F.2d 621, 624 (D.C. Cir. 1989) (internal quotations omitted). But the plain reading of § 602(6) involves no "blatant absurdity." Another provision of the Cable Act, § 621(e), makes clear that the language of § 602(6) was not inadvertent:

> Nothing in this [Act] shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

47 U.S.C. § 541(e) (1988). And the plain reading of § 602(6) is made fully intelligible by the regulatory history predating the Cable Act, which we described in section I. *supra*. The presence of "external" wires, interconnecting separately-owned buildings, had long been a defining characteristic of "cable systems." *See City of New York v. FCC*, 486 U.S. 57, 66-70 (1988) (relying on regulatory background of Cable Act to interpret statutory provision).

Nor is this that "rare case[] in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," as demonstrated by "some clear indication of congressional intent . . . in the legislative history." *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 578 (D.C. Cir. 1990) (internal quotations omitted). First, there is legislative history that supports the FCC. Section 634, the equal employment opportunity provision, states that "[f]or purposes of this section, the term 'cable operator' includes any operator of any

satellite master antenna television system." 47 U.S.C. § 554(h)(1) (1988). The House committee report notes: "Subsection (h) provides that operators of satellite master antenna television systems (SMATV) are subject to the requirements of this section, whether or not such systems only serve commonly owned apartment units without crossing public rights of way." H. REP. No. 934, 98th Cong., 2d Sess. 93 (1984) ("*House Report*"). This passage implies that § 602(6) does not exempt *external, quasi-private* SMATV systems.

Petitioners adduce other excerpts from the legislative history; however, these excerpts are at best ambiguous. In general, petitioners fail to distinguish between the "core" meaning of terms like "cable television" or "SMATV," and less paradigmatic meanings. The core meaning of "cable television" is a system that interconnects an entire locality, transecting local rights-of-way. *See* 129 CONG. REC. 15,590 (1983) (statement of Senator Hollings during Cable Act debate) ("[cable] cannot operate without crossing city streets"). The core meaning of "SMATV" is a system located wholly on private property, serving a single building or a commonly-owned complex. *See* S. REP. No. 67, 98th Cong., 1st Sess. 18-19 (1983) ("*Senate Report*") ("The second exemption [in the Senate's version of § 602(6)] is for a facility . . . that serves only subscribers in one or more [multiple-unit] dwellings under common ownership, control, or management. These are the so-called private cable systems, or master antenna television (MATV) or satellite master antenna television (SMATV) systems."). General descriptions of Congress' purpose that contrast "cable" with "SMATV"—for example, the statement in the *Senate Report* that "cable faces major

competition from such sources as MDS, MATV, SMATV, DBS, STV, television, radio . . . and other media" [10]—surely use the two terms in their core meanings. And even specific commentary on § 602 (6) (B) may be interpreted as using the core meaning of "SMATV." The *House Report* specifies:

> There are four specific exemptions to the term 'cable system' . . . [*inter alia*] a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings (in other words, a satellite master antenna television system), unless such facility or facilities use a public right-of-way . . . .

House Report at 44. The foregoing excerpt arguably might support petitioners. However, it is also possible that the phrase "under common ownership, control, or management" was omitted inadvertently, or assumed to be part of the definition of a "satellite master antenna television system." [11]

In short, the express terms of the Cable Act cannot reasonably be construed to exempt *external, quasi-private* SMATV facilities. The definitional clause of § 602(6) plainly covers such facilities; the private

[10] *Senate Report* at 30; *see also id.* at 5 (similar contrast between "cable" and "SMATV"); *House Report* at 22 (same); *id.* at 22-23 (same).

[11] Similarly, the *House Report* states: "Section 621(e) clarifies that this bill does not affect the authority of a state or political subdivision to license or regulate an SMATV system which does not use public right[s]-of-way." *House Report* at 63. Again, the omission of "under common ownership, control, or management" could be inadvertent, or the statement could be using the core meaning of "SMATV system."

cable exemption, § 602(6)(B), plainly does not. This plain meaning is neither absurd, nor contradicted by the legislative history. Thus, we must consider petitioners' constitutional challenges.

B. *The Constitutional Challenges*

1. *First Amendment*

At the outset, we acknowledge that a First Amendment problem is posed. "Cable television . . . is engaged in 'speech' under the First Amendment," *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991), and § 621(b)(1) imposes a burden on that speech. Respondents argue that the provision is no burden at all—that it merely *permits* local franchising—but this argument is unpersuasive. By its plain language, § 621(b)(1) creates an obligation for cable operators. As the Commission itself has stated, "[s]ection 621(b)(1) of the Cable Act requires that a firm seeking to construct and operate a cable television system must first obtain a franchise from the state government or its local designate." *In re Competition*, 5 F.C.C. Rcd. 362, 366 (1989); *see also House Report* at 59 ("[u]nder subsection 621(b), no cable operator may provide cable service without a franchise issued by a state or a franchising authority"); *Senate Report* at 19 ("[Senate version of § 621(b)] provides that no cable system shall provide . . . cable service without a cable franchise"). Thus, by virtue of § 621(b)(1), the Cable Definition Rule obliges petitioners to obtain local franchises for their *external, quasi-private* SMATV systems.

However, as respondents correctly argue, neither the FCC nor Congress has fully *defined* this obligation. The Cable Act creates a franchise requirement,

but gives localities broad discretion to determine the substance and process of franchising. The Act permits but does not require exclusive franchising: "A franchising authority may award . . . 1 or more franchises within its jurisdiction." 47 U.S.C. § 541 (a)(1) (1988); *see also House Report* at 59 ("[t]his provision grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area"); *In re Competition*, 5 F.C.C. Rcd. at 366 (Cable Act "allows, but does not require, the franchising authority to grant more than one franchise to serve the same community"). Similarly, the Act does not generally require that localities impose special duties on franchisees,[12] but simply permits localities to regulate cable rates, *see* 47 U.S.C. § 543 (1988), set aside public channels, *see id.* § 531, or levy a franchise fee, *see id.* § 542. And, in general, the statute gives only minimum specifications for franchising procedures.[13] In short, a locality could adopt a

[12] One exception is the "redlining" provision: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3) (1988).

[13] Section 626 does partially specify a procedure for franchise renewals. *See* 47 U.S.C. § 546 (1988). However, subsection (h) states that "[n]otwithstanding [these specifications], a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time." *Id.* § 546(h). Section 625 partially specifies a procedure for franchise modifications. *See* 47 U.S.C. § 545 (1988).

summary process for franchising *every external, quasi-private* SMATV facility, and local SMATV operators could discharge their § 621(b)(1) obligation by complying with this process. Such a franchising regime would pose very different First Amendment problems than a costly, exclusive-franchising system.

Because localities have discretion to define the § 621(b)(1) duty, and because the justification for that duty will depend on local facts, petitioners' First Amendment challenge is unripe. We test the ripeness of this facial, pre-enforcement challenge to an agency action by balancing two factors: the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967).[14]

In this case, our treatment of the "fitness" question is similar to the standard treatment of a facial challenge where the federal agency itself has discretion. As we noted in *Action Alliance of Senior Citi-*

[14] "Generally, in ascertaining whether a suit is ripe, courts must balance the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystalizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Payne Enters. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988) (internal quotation omitted). And, "under the ripeness doctrine, the hardship prong of the *Abbott Laboratories* test is not an independent requirement divorced from the consideration of the institutional interests of the court and agency." *Id.* at 493. Thus, if a "matter is clearly fit to be heard, we need not consider whether petitioners would suffer any hardship from our postponing its resolution." *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 577-78 (D.C. Cir. 1990).

zens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), a "facial, purely legal challenge is both more difficult and less worthwhile when the prescription challenged is discretionary. To hold the provision invalid on its face, a court would have to conclude that the provision stands in conflict with the statute regardless of how the agency exercises its discretion." *Id.* at 941. Here, it is localities that have the discretion, not the FCC, but the same principle applies. In short, we "believe that judicial appraisal" of the First Amendment issue "is likely to stand on a much surer footing in the context of a specific application of [the Cable Definition Rule] than would be the case in the framework of the generalized challenge made here." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).[15]

First, we will benefit from postponing review until an as-applied challenge because the First Amendment analysis depends on the local franchising regime. Different regimes will impose different burdens, which may or may not be justifiable under the First Amendment. Moreover, the judicial standard for evaluating the justification will vary with the regime. This standard depends on:

> whether, in the case of a regulation of activity which combines expressive with nonexpressive elements, the regulation aims at the activity or the expression; whether the regulation restricts speech itself or only the time, place, or manner of speech; and whether the regulation is in fact content-based or content-neutral.

[15] Although a First Amendment overbreadth challenge would not be context-dependent, petitioners have not presented such a challenge. We offer no views on the likely success of such a challenge.

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S.Ct. 501, 514-15 (1991) (Kennedy, J., concurring in judgment) (citations omitted). A particular local franchising system may impose only an "incidental" burden on the speech of SMATV operators, and thereby trigger the so-called *O'Brien* test, *see United States v. O'Brien*, 391 U.S. 367, 377 (1968); or, alternatively, the franchising system may impose "direct" burdens that require stricter First Amendment scrutiny. *Cf. Century Communications Corp. v. FCC*, 835 F.2d 292, 298 (D.C. Cir. 1987) (declining to decide "precise level of first amendment protection due a cable television operator," and applying *O'Brien* as minimum standard), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985) (same), *cert. denied*, 476 U.S. 1169 (1986).

Second, the court reviewing an as-applied challenge will have specific information about the local conditions that might justify SMATV franchising. "[W]hether the means chosen are congruent with the desired end" for purposes of *O'Brien* or a stricter First Amendment test is a "delicate fact-bound issue." *Century Communications*, 835 F.2d at 298. In *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986), a disappointed applicant for a cable television franchise had sued Los Angeles, claiming that the city's exclusive-franchise regime violated the First Amendment. The Supreme Court allowed the applicant to pursue his complaint, but refused to reach the merits of the First Amendment issue without further factual development.

> The City has adduced essentially factual arguments to justify the restrictions on cable fran-

> chising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings . . . .

Id. at 494.

To be sure, the "fitness of the issues for legal decision" is only the first factor in the *Abbott Laboratories* calculus. If, as here, we find a case unfit for review, then we must weigh the "hardship to the parties of witholding court consideration." Hardship depends, in part, on whether the Cable Definition Rule is "interpretative" or "substantive." *See* ACLU, 823 F.2d at 1576-79. Assuming, *arguendo*, that the rule is substantive, it has a direct effect on petitioners' "primary conduct." *Toilet Goods*, 387 U.S. at 164. The operators of *external, quasi-private* SMATV facilities may well submit to local franchising so as to avoid federal enforcement action. "The paradigmatic hardship situation is where a petitioner is put to the choice between incurring substantial costs to comply with allgedly unlawful agency regulations and risking serious penalties for non-compliance." *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1988). Here, noncompliance entails a risk of civil or even criminal penalties. *See* 47 U.S.C. § 503 (1988) (forfeiture penalty for violating title 47, chapter 5); *id.* § 501 (1988) (criminal penalty for violating title 47, chapter 5).

On the other hand, it is unclear whether petitioners will incur "substantial" costs by franchising their systems, because the cost depends on the local franchising regime. Any regime will impose some burden

on petitioners' speech, and that *is* a higher "cost" for purposes of *Abbott Laboratories* than mere monetary expense,[16] but the First Amendment burden may be "incidental." Moreover, it is possible that petitioners might avoid the Hobson's choice between compliance and the risk of enforcement by bringing an anticipatory, as-applied challenge. Since the First Amendment issue is wholly unfit for judicial decision, petitioners' hardship is not so substantial as to require immediate decision. On balance, their First Amendment challenge is unripe.

2. *Equal Protection*

Petitioners also raise a Fifth Amendment equal protection challenge to the Cable Definition Rule. They claim that the franchising requirement for *external, quasi-private* SMATV fails the "fundamental rights" equal protection scrutiny accorded statutes infringing speech, *see, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); and, in the alternative, that the requirement fails the economic "rational basis test," *see, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Under either test, petitioners argue, there is no adequate justification for discriminating between *external, quasi-private* SMATV and the exempted *internal* and *wholly private* facilities.[17]

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[16] *See United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152, 1160 n.29 (D.C. Cir. 1987) (*Abbott Laboratories* hardship "is especially pressing here in view of the fact that the activity inhibited involves not merely business but also speech and religious exercise").

[17] We cannot avoid the equal protection challenge, because the Cable Act cannot reasonably be construed to define *wholly*

At this point, it appears that the distinction in the Cable Act between *external, quasi-private* SMATV and the exempted facilities may violate the minimal equal-protection test. As noted below, we will direct the FCC to consider whether some "rational basis" justifies the distinction. If the FCC is unable to provide a "rational basis," then we will decide without more that the Cable Definition Rule violates the equal protection component of the Fifth Amendment. However, if the FCC *does* furnish a "rational basis," and we conclude that the Cable Definition Rule satisfies the minimal test, we will need to consider whether a heightened-scrutiny equal protection challenge is ripe. For now, however, we need not address the "fundamental rights" claim, because the "rational basis" claim is ripe and apparently valid.

Unlike petitioners' First Amendment claim, the "rational basis" claim does not depend on particular circumstances. First, the *standard* for evaluating that claim does not vary with local conditions. "At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate govern-

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private facilities as "cable systems." The private cable exemption, § 602(6)(B), plainly states that a facility serving a single multiple-unit dwelling or a complex of buildings that are commonly owned, managed or controlled is not a "cable system" unless the facility uses a right-of-way. We need not decide at this point whether *internal* facilities that are *not wholly private* (e.g., a MDS facility serving a group of separately-owned, controlled and managed buildings) might be "cable systems" under a reasonable construction of § 602(6). *DeBartolo* will require us to address that question only if the FCC provides a "rational basis" for the distinction between *external, quasi-private* SMATV and *wholly private* facilities, but not between *external, quasi-private* SMATV and *internal* facilities.

mental objectives." *Schweiker*, 450 U.S. at 230. Whatever the features of the local franchising regime —whether it imposes an "incidental" or "direct" burden on petitioners—the exemption for non-burdened facilities must meet this minimum standard.

Second, the *application* of that standard is also context-invariant. If some *external, quasi-private* SMATV operator were to raise an as-applied, rational-basis challenge to local franchising, the relevant question would *not* be whether SMATV franchising was "rationally related to a legitimate government purpose" *in that locality*. Rather, the reviewing court would seek some rational relation *as a general matter*. "Insistence on a tight fit between legislative means and ends is called for only when Congress acts along suspect (or semi-suspect) lines or in contravention of fundamental liberties . . . ." *Women Involved in Farm Economics v. USDA*, 876 F.2d 994, 1004 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The rational-basis test permits "general rules . . . , even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Id.* at 1007 (internal quotation omitted); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-4 (2d ed. 1988) (test may permit "overinclusiveness" and "underinclusiveness").

Thus, the rational-basis claim is "purely legal" for purposes of *Abbott Laboratories*, and we reach the merits.[18] *Cf. Preferred Communications*, 476

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[18] Where an issue is "fit for judicial decision," we need not evaluate the "hardship to the parties," but rather proceed directly to the merits. *See, e.g., American Petroleum Inst. v. EPA*, 906 F.2d 729, 739 n.13 (D.C. Cir. 1990).

We acknowledge that the as-applied, rational-basis challenge might depend on the *kind* of local franchising regime. Conceivably, the exemption of MDS, single-building SMATV

U.S. at 495-96 (implying that Court would not have needed fuller factual development for rational-basis challenge to cable franchising); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (in facial challenge to local rent control ordinance, finding "takings" claim unripe, but equal protection claim ripe).

On the record before us, we fail to see a "rational basis" for franchising *external, quasi-private* SMATV but not *internal* and *wholly private* systems. The fact that cable television uses public rights-of-way has been the predominant rationale for local franchising. As the FCC stated in promulgating the Cable Definition Rule: "The dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve." *In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638, 7639 (1990). The FCC articulated this rationale throughout the pre-Cable Act period. *See, e.g., Cable Television Report & Order*, 36 F.C.C.2d 143, 207 (1972) ("persuasive argument[] against federal licensing" is that "cable makes use of [local] streets and ways"); *In re Amendment of Part 76*, 54 F.C.C.2d 855, 861 (1975) ("ultimate dividing line [between local and federal cable regulation] . . . rests

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and other such facilities from one kind of franchising regime would pass rational-basis scrutiny, while their exemption from another kind would not. However, this possibility seems too speculative to justify deferring review, since we are hard pressed to imagine why *any* kind of discriminatory franchising system is justified. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 135 (Yale Univ. Press 1986) (1962) (ripeness "depend[s] on at least an initial judgment of the merits").

on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications"); *Orth-O-Vision*, 82 F.C.C.2d at 183 (citing 1972 report); *Earth Satellite Communications*, 95 F.C.C.2d at 1235 (same). And Congress did the same in promulgating the Cable Act. *See Senate Report* at 7 (Senate bill "seeks to restore the jurisdictional boundaries over cable to their more traditional positions," with the "'ultimate dividing line . . . [resting on cable's] use of the streets and rights-of-way'") (quoting 1975 report); 129 CONG. REC. 15,590 (1983) ("[n]o one can doubt that localities should be able to exert some control over cable because it crosses public rights of way") (Senator Hollings).

However, this right-of-way rationale does not explain the distinction between *external, quasi-private* SMATV and *internal* or *wholly private* facilities, because none of the three use public rights-of-way. Nor do the congressional reports and debates on the Cable Act articulate an explanation. We assume without deciding that minimum equal protection scrutiny requires only a "conceivable basis," not an "articulated basis." *See Women Involved in Farm Economics*, 876 F.2d at 1005 n.7. Nonetheless, we are unable to imagine *any* basis for the distinction.

Rather than vacating the Cable Definition Rule, we direct the FCC to address the rational-basis issue. "[I]t may sometimes be appropriate to resort to extra-record information to enable judicial review [of agency action] to become effective." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). Where this court "needs more evidence to enable it to understand the issues clearly," *id.*, we have discretion to

supplement an administrative record. In the instant case, we require additional "legislative facts" concerning the distinction between *external, quasi-private* SMATV and the video transmission facilities exempted by the Cable Definition Rule. *See* 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 175-77 (2d ed. 1980) (courts should in some instances remand to agencies for legislative factfinding on constitutional issues); *cf. National Wildlife Fed'n v. ICC*, 850 F.2d 694, 702-08 (D.C. Cir. 1988) (remanding for reconsideration of "takings" issues that agency had inadequately addressed). Thus, we direct the FCC to consider within 60 days whether there is some "conceivable basis" for requiring local franchising of *external, quasi-private* SMATV facilities but not *private* or *wholly internal* facilities.

III. CONCLUSION

The Cable Act plainly defines an *external, quasi-private* SMATV facility as a "cable system." Petitioners' First Amendment challenge to the local franchising of *external, quasi-private* SMATV is unripe, but we reach the merits of their equal protection challenge. The FCC is directed to consider within 60 days whether there is some "rational basis" for a distinction between *external, quasi-private* SMATV and those facilities that the FCC has ruled exempt from local franchising. Accordingly, the record is hereby remanded.

MIKVA, *Chief Judge*, concurring in part and concurring in the judgment: "In cases where a classification burdens neither a suspect group nor a fundamental interest," the Supreme Court recently reminded us, "'courts are quite reluctant to overturn

governmental action on the ground that it denies equal protection of the laws.'" *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2406 (1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). Although I concur in most of my colleagues' opinion, I do not join section II(B)(2), the section addressing petitioners' equal protection challenge, because I think it shows too little reluctance to overturn complex economic legislation under the minimal rational-basis test.

To my colleagues, the FCC's distinction between different types of SMATV systems—a distinction, I agree, that is required by the plain meaning of the Cable Act—"poses a serious constitutional problem." Maj. op. at 3. It "may violate the minimal equal-protection test," maj. op. at 21; indeed, the equal-protection claim is "apparently valid." Maj. op. at 22. Although acknowledging that petitioners' challenge must fail if the law rests on a "rational basis," my colleagues see nothing "[o]n the record before us" to sustain the challenged distinction, maj. op. at 23, and are "unable to imagine *any* basis for the distinction," maj. op. at 24, a point they repeat for emphasis, *see* maj. op. at 22 n.18. My colleagues remand so that the FCC can provide a justification for the distinction, but their strong language might suggest that no justification will satisfy them.

Such a conclusion would, in my view, mark a new and unfortunate turn in rational-basis review. The Constitution is a blueprint for a workable government, and "[w]e must remember," as Justice Holmes wrote, "that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). When Congress and state legislatures confront complex problems, interest groups and experts push many

different, frequently incompatible, solutions. The democratic process—politics, if you will—often denies legislatures the option of picking the theoretically *correct* outcome, leaving them to strive for the *best possible* outcome under the circumstances. Because the only alternative would be to discourage legislators from making even an attempt to address complicated social and economic problems, the Constitution wisely permits legislative bodies to piece together practical plans—"rough accommodations," as the Supreme Court put it long ago, "illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913). Undoubtedly, the political process sometimes gets it wrong, but the Constitution presumes that, as long as the groups involved have a fair chance to fight in the political arena, the democratic process will right itself. Legislatures may change flawed laws, or voters may even "throw the bums out." The Constitution reserves judicial review for situations where one may suspect the democratic process. It forbids the judiciary from "sit[ting] as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

None of that is new, of course, and I doubt that my colleagues disagree with the background. But I think we should keep that background in mind as we engage in constitutional scrutiny under the rational-basis test. Under that test, legislatures may single out classes of people as long as the lines drawn are not "'invidious or irrational.'" *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 (1980) (citation omitted). "A classification having some reasonable basis does not offend [equal protection principles] merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (quoted in more than two-dozen Supreme Court cases including, most recently, *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989)). Accordingly, the Supreme Court has struck down only a handful of statutes under the rational-basis test; even the *Lochner* Court rarely invoked equal protection principles to invalidate economic legislation. And almost every law declared unconstitutional under rational-basis review involved a class of people who, for one reason or another, faced obstacles to their participation in the political process that produced the challenged law—such as the mentally retarded, *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); children of illegal aliens, *see Plyler v. Doe*, 457 U.S. 202 (1982); or out-of-state companies challenging a state law that "discriminat[ed] against nonresident competitors," *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 n.5 (1985); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3 p. 1445 (2d ed. 1988) ("Th[e] sporadic move away from near-absolute deference to legislative judgments seems to be a judicial response to statutes creating distinctions among classes of residents based on factors the Court evidently regards as in some sense 'suspect' but appears unwilling to label as such.").

Not only should economic legislation be upheld as long as the classifications drawn in the statute "are reasonable in light of its purpose," *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964), but the justification for the legislation need not appear in the legisla-

tive or administrative record. As the Supreme Court has said:

> Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.

United States R.R. Retirement Bd., 449 U.S. at 179 (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). My colleagues "assume without deciding" that minimal equal protection scrutiny requires only a "conceivable basis," not an "articulated basis," maj. op. at 24, but I think that question is settled. The Supreme Court stated last Term that, under the rational-basis test, a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'" *Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987) (emphasis added)). My colleagues are right to search the record for possible justifications, *see* maj. op. at 22, but to the extent their opinion implies that justifications in the record are necessary or have special significance in rational-basis review, I must disagree.

Against a rational-basis challenge, I think the Cable Act comes to us bearing a very strong presumption of constitutionality, a presumption that can be sustained by justifications in or out of the record. The Cable Act is a large and complex piece of socioeconomic legislation, an effort to establish a comprehensive regulatory scheme for the cable industry, a product of public hearings, private negotiations, and compromise. SMATV operators, the petitioners in this suit, participated actively in the process and, in fact, did quite well. With only one exception—the one at issue here: SMATV systems that interconnect multiple, separately owned buildings with physical wiring on private property—SMATV facilities are excluded from Cable Act requirements. My colleagues appear to think that the challenged provision of the Cable Act is unlikely to survive minimal equal-protection review (though I'm not sure how they can suggest that the challenged provision is absurd for purposes of constitutional analysis after holding that the FCC's reading of the provision is not absurd for purposes of statutory analysis, *see* maj. op. at 11). I do not share my colleagues' doubts. Perhaps rough, the distinctions in the statute strike me nevertheless as entirely reasonable in light of the Cable Act's purposes.

As I read section II(B)(2), my colleagues are troubled by two distinctions in the law. The first is between what my colleagues call "external, quasi-private" SMATV (subject, under the challenged provision, to Cable Act requirements) and "internal" SMATV (not subject, under the challenged provision, to Cable Act requirements). That distinction seems to me a reasonable way to promote the development of non-physical video delivery systems. Under the statute, a SMATV facility serving multiple, separately owned buildings is covered by the Cable Act if the broadcast signal is transmitted to the buildings through cable or other physical wiring, and exempt from the Cable Act if the broadcast signal is transmitted through the air via radio waves. (The latter system is the one my colleagues' term "internal" and,

although I am happy to borrow the useful shorthand, I think it is worth noting that an "internal" system does serve multiple buildings.) The effect of the rule, as both petitioners and the FCC say, is to create an incentive for SMATV operators to switch from physical wiring to radio transmission so that they are exempt from regulation under the Act. But that, I think, is entirely consistent with Congressional and FCC policy of promoting "new technologies that offer substantial public benefits." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1197 (D.C. Cir. 1984). In fact, the FCC chose to preempt local regulation of some SMATV systems in part to advance "the federal interest in 'the unfettered development of interstate transmission of satellite signals.'" *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 808 (D.C. Cir. 1984). That same federal interest, it seems to me, justifies the statutory distinction here. I am not at all persuaded that a classification that encourages SMATV operators to use radio-wave technology instead of cable wiring violates equal protection principles.

My colleagues also seem to be concerned about the distinction between "external, quasi-private" SMATV (subject, again, to Cable Act requirements) and "wholly private" SMATV (not subject to Cable Act requirements). I think that distinction is reasonable in light of the Cable Act's purpose of promoting consumer, or viewer, interests. Under the statute, a SMATV system on private property is covered by the Cable Act if it serves multiple buildings that are *not* commonly owned, managed or controlled, and not covered by the Act if it serves buildings that *are* commonly owned, managed or controlled. In adopting the Cable Act, Congress could have taken the reasonable

position that a SMATV system serving multiple buildings not under common ownership is similar to a traditional cable system and likely to give rise to similar problems from the perspective of the viewer. Congress could have reasoned, meanwhile, that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership likely to be greater, so that the costs of regulation could outweigh the benefits. Similarly, in adopting the SMATV provision, Congress could have concluded that regulation of facilities serving multiply owned buildings is a reasonable way to enhance the diversity of broadcast information, while SMATV systems serving buildings commonly owned are, again, likely to be smaller and not in need of regulation. The challenged classifications, in sum, pose line-drawing problems. "[A]nd the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Bd.*, 449 U.S. at 179.

Because my colleagues mention only the public rights-of-way rationale for the Cable Act, I should note that the consumer-interest and diversity-of-information rationales plainly appear on the face of the Act (along with four other stated objectives): the law is intended to "establish franchise procedures and standards which encourage the growth and development of cable systems and which *assure that cable systems are responsive to the needs and interests of the local community*"), 47 U.S.C. § 521(2) (emphasis added); and it is intended to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). (The

Act is also intended to serve the broad purpose of "establish[ing] a national policy concerning cable communications." 47 U.S.C. § 521(1).) The Cable Act provides for the regulation by franchising authorities, under certain circumstances, of cable systems' rates, services, facilities and equipment. 47 U.S.C. §§ 543-544. And it contains provisions designed to encourage diversity of information distribution, such as those authorizing franchising authorities to require that cable operators set aside a portion of their channels for public, educational and governmental access channels, 47 U.S.C. § 531, and for other programmers, 47 U.S.C. § 532.

In light of the requirements the Cable Act imposes, the Cable Definition Rule might raise First Amendment questions and it might pose problems under "fundamental rights" equal-protection scrutiny—questions, I agree with my colleagues, we need not now decide. But I think the statute does not pose serious constitutional problems under rational-basis review. The classifications in the cable definition provision, as I've suggested, are reasonable in light of the Cable Act's purposes. In fact, given the variety and scope of the statute's purposes, I am confident the FCC will suggest justifications I have not mentioned.

I do not, finally, disagree with my colleagues' decision to remand the case to the FCC so that it can provide justifications for the classifications in the statute. This is a complicated area, and the expert agency is certainly better equipped than the court to put the classifications in context. Unfortunately, when the FCC defended the Cable Definition Rule before us, it provided no explanations for the distinctions in the law. It chose not to reply to petitioners'

constitutional arguments, resting on its response that the challenges were not ripe. The Commission should have done more, and my colleagues are right to demand more. I only hope that my colleagues' dicta about the merits of petitioners' rational-basis claim reflect frustration with the FCC rather than a new approach to rational-basis review.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

[Filed May 5, 1992]

REPORT OF RESPONDENT FEDERAL COMMUNICATIONS COMMISSION IN RESPONSE TO OPINION OF MARCH 6, 1992

The Federal Communications Commission respectfully submits this report in response to the Court's opinion of March 6, 1992, in the captioned case. The Court in that opinion affirmed the FCC's interpretation of the definition of a "cable system" set forth in the 1984 Cable Act. Slip opinion at 11-15. But the Court remanded the record to the FCC with directions that it "consider within 60 days whether there is some 'rational basis' for a distinction between *external, quasi-private* SMATV and those facilities that the FCC has ruled exempt from local franchising." Slip opinion at 21-25 (emphasis in original). The remand came in the context of the Court's consideration of an argument on review that the definitional rule set forth in the Cable Act violates equal protection rights by subjecting to local franchise regulation some facilities that are not rationally distinguishable from other facilities that are exempt from franchise regulation. For the reasons set forth below, the Commission hereby reports to the Court that it is unable to provide additional "legislative facts," beyond those provided by Judge Mikva in his concurring opinion, in justification of the distinctions set forth in the Cable Act.[1]

The equal protection issue in this case involves three types of video delivery systems, none of which uses the public right-of-way. The first, in terminology adopted by the Court for purposes of this opinion, is an "external, quasi-private" facility that uses wire (or other "closed transmission path") "externally" to connect separately-owned, managed, or operated multiple-unit buildings. The second is an "internal" facility that uses wire or cable only "internally" in the buildings it serves and uses technology other than wire (or other closed transmission path) to interconnect separate buildings. The third is a "wholly private" facility that serves a single building or a group of commonly-owned, managed, or operated multiple-unit buildings interconnected by wire or some other open or closed transmission path. Slip opinion at 10. Under the Cable Act definition of a cable system, as interpreted by the FCC, an "external, quasi-private facility" is subject to local franchise regulation, whereas "internal" and "wholly

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[1] The Commission instructed its General Counsel to make this report to the Court in an appropriate pleading.

private" facilities are not. Slip opinion at 23.[2] Because a majority of the panel was "unable to imagine *any* basis for the distinction" between the systems subject to franchising and those not subject to franchising, slip opinion at 24, the Court remanded the record to permit the Commission to consider whether there is some "conceivable basis" for the distinction, slip opinion at 25.

The majority opinion also identified other equal protection issues that might have to be addressed, depending upon the showing the Commission might make after remand. Thus, the majority stated that it would "need to consider whether a heightened-scrutiny equal protection challenge is ripe" if it were persuaded by a Commission showing that the cable definition satisfied the minimal "rational basis" test. Slip opinion at 21-22. If the challenge were ripe, the Court presumably would move on to that issue and require further, more elaborate showings of justification under the heightened scrutiny test. The majority also stated that if the FCC were to provide a "rational basis" for the distinction between "external" and "wholly private" facilities, but not for the distinction between "external" and "internal" facilities, the Court itself might have to consider whether a reasonable construction of the definitional section of the Cable Act would permit a resolution of the equal protection claim. Slip opinion at 21 n.17. The majority implied that such a reasonable construction might take the form of including "internal" systems within

[2] The Court affirmed the Commission's interpretation of the definitional provisions, finding that "there is no reasonable alternative construction" that would exempt external, quasi-private SMATV facilities from local franchise regulation. Slip opinion at 11-15.

the definition of a cable system and thus subjecting them to local franchising requirements, *id.*—a solution that would impose regulation on a class of systems that the Commission never has considered to be cable systems.

In a concurring statement, Judge Mikva disagreed with the majority's suggestion that "no justification" can save the definitional provisions of the Cable Act. Addressing himself to the three categories of facilities, Judge Mikva offered four pages of analysis that in his view made the classifications "reasonable in light of the Cable Act's purposes." Slip opinion, concurring statement of Judge Mikva ("concurring statement") at 4-7. Although Judge Mikva concurred in the decision to remand the record and although he recognized that the definitional scheme "might raise First Amendment questions and . . . might pose questions under 'fundamental rights' equal protection scrutiny," he asserted that "the statute does not pose serious constitutional problems under rational-basis review." Concurring statement at 7. Judge Mikva would have held that legislatures may single out classes of people (and, presumably, classes of video delivery systems) "as long as the lines drawn are not 'invidious or irrational.'" Concurring statement at 2 (*quoting United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 (1980)).

Although the majority presumably had the concurring statement before it, *see* "Handbook of Practice and Internal Procedures," D.C. Circuit (August 1, 1987), at 63, the majority opinion did not address the analysis that statement provided. The majority's strong language, in fact, suggests that it would not accept that analysis as a jusification for the different treatment of the classes of facilities. *See* slip opinion at 23 (majority "fail[s] to see" a rational basis), 24

most of it has been assigned to specific licensees." *Notice of Proposed Rule Making and Tentative Decision in GEN Docket No. 90-314*, 7 F.C.C. Rcd. 5676, 5689 (1992). Greater use of the airwaves, to the extent they remain available, increases the potential for signal interference between users. It is inconceivable that Congress would advocate the use of scarce radio waves to interconnect buildings, when alternative physical media are available for that purpose.[12] Indeed, the FCC is actively "encouraging migration to other, non-radio alternative media" by licensees who are technically capable of doing so, to make room on the spectrum for developing technologies that have no alternative to the use of radio frequencies. *Notice of Proposed Rule Making in ET Docket No. 92-9*, 7 F.C.C. Rcd. 1542, 1548, n.17 (1992) (proposing financial incentives for certain current users of radio waves to switch to fiber, thereby creating spectrum space for emerging communications technologies that require use of radio).

Chief Judge Mikva's suggestion that the anomalies of the discriminatory classification reflect congressional intent to "promote the development of *non-physical* video delivery systems," App. at 41a (emphasis added), conflicts with the actual federal policy encouraging use of "*non-radio* alternative media." *ET Docket No. 92-9*, 7 F.C.C. Rcd. at 1548, n.17 (emphasis added). Since federal policy favors the use of physical media, the discriminatory classification cannot be saved by attributing to Congress a contrary and unwise policy.[13]

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[12] After all, to interconnect adjacent separately-owned buildings by a short span of cable wiring is technically simpler, more efficient, very inexpensive and involves no potential interference to other communications users.

[13] Following remand to the FCC, the D.C. Circuit adjudicated the unconstitutionality of Section 602(6) *solely* on the basis of the arbitrary distinction between commonly and separately-owned buildings. App. at 3a. If this Court were inclined to review

[footnote continued]

C. The Federal Communications Commission Failed To Offer A Conceivable Basis For The Discriminatory Classification.

The court of appeals bent over backwards, but still could not conceive of a rational basis to sustain the constitutionality of Section 602(6). When the FCC failed to proffer a conceivable basis either in its briefs or at oral argument, the court of appeals afforded the agency an extra opportunity upon remand to defend Congress' discriminatory classification. App. at 36a. Upon remand, the FCC was clearly unable to proffer a conceivable governmental interest in regulating, to any extent, the ability of video providers to engage in protected speech which occurs wholly on private property, much less a conceivable governmental interest in exempting the protected speech of most, but not all, video distribution systems occurring wholly on private property from such entry regulation. While Petitioners seek to characterize the FCC's response as a substantive one which fully buttresses the two justifications offered by Chief Judge Mikva, and which reflects congressional intent, the FCC's Report was in reality a faint endorsement of Chief Judge Mikva's reasoning and a barely disguised *rejection* of Congress' classifications:

> [T]he Commission hereby reports to the Court that it is unable to provide additional "legislative facts," beyond those provided by Judge Mikva in his concurring opinion, in justification of the distinctions set forth in the Cable Act. [footnote omitted]
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that determination, the Petition should still be denied since, even if a rational basis for that distinction were found, it would not justify the distinction based upon whether separately-owned buildings are interconnected by wire versus wireless technology. This latter distinction is supported only by the theory that Congress intended to use up valuable spectrum space. That is an untenable theory, as shown above, and as strongly suggested by the D.C. Circuit. App. at 34a.

From its review, after remand, of the relevant legislative history and of its own policy preferences, the Commission is unaware of any desirable policy or other considerations – beyond those suggested by Judge Mikva in his concurring opinion – that would support the challenged distinctions.

* * *

As the Court may recall [footnote omitted], the Commission in an earlier interpretation of the cable definition had taken the position that, when multiple unit dwellings are involved, a facility's use of the public right-of-way should be the sole basis for determining the facility's status as a cable system and therefore its susceptibility to local franchise regulation [citing *In Re Amendment of Parts 1, 63 and 76 of the Commission's Rules,* 58 Rad. Reg. 2d (P&F) 1, *modified,* 104 F.C.C.2d 386 (1986), *aff'd in part and rev'd in part, American Civil Liberties Union v. FCC,* 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 959 (1988)]. Under that interpretation, which reflected the Commission's own policy preference, none of the facilities under consideration here would have been subject to franchise regulation under the Cable Act.

* * *

The Commission's current interpretation of the cable definition, which results in the regulatory distinctions that are challenged on equal protection grounds, was dictated by the unambiguous language of the statute, and not by any policy determination by the FCC in support of that interpretation.

App. at 47a, 50a-51a.

The FCC was more interested in ensuring that the court of appeals knew that Congress was in the process of amending the Cable Act, had been informed of the court of appeals' March 6, 1992 decision, and thus would have the "opportunity to revise the definitional provisions of the 1984 Act" if it chose to do so. App. at 51a-52a. It

is telling that Congress, in fact, chose *not* to do so[14] in the face of the recommendation by the majority of the court of appeals that Congress "act to remedy the situation" if Congress found the court to have "misunderstood congressional intent in [its] construction of the Act and its underlying purposes". App. at 6a-7a. "Congress is presumed to be aware of a[ ] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ." *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (citation omitted). Thus, Congress and the FCC apparently stand united at this juncture in their joint policy decision that only those video distribution systems using public rights-of-way to deliver their services to the public should be subjected to local franchising jurisdiction. This Court need not grant review upon Petitioners' urging to reinstate a franchising requirement that Congress itself chose not to reinstate. *Lorillard,* 434 U.S. at 580.

II.
THIS COURT NEED NOT GRANT REVIEW BECAUSE THE COURT OF APPEALS APPLIED THE PROPER STANDARD FOR RATIONALITY REVIEW.

Petitioners' discussion of this Court's precedents concerning the rationality review standard underscores, rather than undermines, the correctness of the court of appeals' ruling here and the court's complete adherence to that standard. For example, Petitioners, Pet. at 17, cite *Vance v. Bradley,* 440 U.S. 93 (1979), for the proposition that "those challenging the legislative judgment must convince the court that the *legislative facts on which the classification is apparently based* could not reasonably be conceived to be true by the governmental decision-maker." *Id.* at 110-111 (emphasis added).

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[14] Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, a major revision of the Cable Act, on October 5, 1992, without altering §602(6).

Yet the court of appeals' decision to remand to the FCC was precisely for the purpose of ascertaining such "legislative facts". *See* App. at 36a ("In the instant case, we require additional 'legislative facts' concerning the distinction between external, quasi-private SMATV and the video transmission facilities exempted by the Cable Definition Rule."). Chief Judge Mikva concurred in the majority's efforts to have "the expert agency [, which] is certainly better equipped than the court [,] put the classifications in context" and recognized that the FCC had "[u]nfortunately . . . provided no explanations for the distinctions in the law". *See* App. at 44a. Since the sole historical rationale for subjecting interstate communications media to local regulation was the public rights-of-way rationale, and since the legislative history of the Cable Act was apparently bereft of any additional rationale for the discriminatory classification, the court of appeals rightly sought assistance from the FCC in identifying the "legislative facts on which the classification is apparently based". Far from providing such legislative facts, the FCC refused to proffer any rationale for the distinction beyond affording lip service to those suggested by Chief Judge Mikva, and instead completely *divorced* itself from Congress' action, asserting that the FCC agreed entirely with the public rights-of-way rationale but was hampered by "the unambiguous language of the statute." *See supra* at 20.

In *Vance*, this Court found the legislative history of the statute at issue replete with references to a proper governmental interest sought to be furthered by the classification as well as the reasons why Congress concluded that such classification would further the governmental objective. Here, the court of appeals found the legislative history of the Cable Act and the pre-Cable Act FCC regulatory policy replete with references to the public rights-of-way rationale as the basis for Congress' interest in permitting local franchising over an interstate

communications media and no reasoning as to how the discriminatory classification rationally furthered that interest. In searching for a different governmental interest sought to be advanced by the classification, the court of appeals was left high and dry by the FCC.[15]

Petitioners further assert that the purpose of the remand was to gather "empirical proof" or an "articulated basis" contrary to this Court's decisions in *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); and *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949). Petitioners are in error. The court of appeals never once indicated in either of its decisions that the FCC was charged with a responsibility greater than simply explaining what "state of facts reasonably may be conceived to justify" the discriminatory classification. *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990), *quoting Bowen v. Gilliard*, 483 U.S. 587, 601 (1987). Given the FCC's expert knowledge of the various video transmission industries, how each operates and their relationship to one another, the court of appeals rightly assumed that if such a "state of facts" could be "conceived", the FCC was in the best position to do so. Even Chief Judge Mikva, the dissenting judge, concurred in this approach. App. at 44a.

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[15]The "discriminatory classification" upheld in *Vance* is not particularly instructive here. Congress distinguished between Foreign Service and Civil Service personnel in establishing a mandatory retirement age, not as between Foreign Service personnel. In the instant case, Congress has not only classified SMATV operators differently from MDS operators for purposes of the franchising requirement, but has also classified certain SMATV operators differently than other SMATV operators, apparently solely on the basis of the ownership of the real estate which such operators may serve. *See generally Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (overturning a classification distinguishing not only between resident veterans and non-veteran residents, but also between resident veterans, solely on the basis of when such veterans moved into the state); *Zobel v. Williams*, 457 U.S. 55 (1982).

The FCC declined to speculate as to Congress' reason for distinguishing amongst those video transmission facilities who made no use of the public rights-of-way for purposes of local entry regulation. The FCC refused to describe for the court of appeals either what dissimilarities or similarities *could* be conceived to exist as between (1) the exempt and nonexempt video distribution facilities and (2) traditional cable systems, so as to justify local regulation of some but not all on a basis other than the historical public rights-of-way rationale. Thus, the court of appeals was correct in concluding that the possible basis posited by Chief Judge Mikva, *i.e.*, "the impression of 'similarity' " between traditional cable systems and external, quasi-private SMATV facilities (necessarily assuming incorrectly a dissimilarity between traditional cable systems and either wholly private SMATV facilities or internal facilities *see supra*, at 13-16), "is just that: a naked intuition, unsupported by conceivable facts or policies [citation omitted]." App. at 4a. *City of Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").[16]

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[16]The purported rationale is also inconsistent with Commission policy regarding the emerging "video dialtone" technology. During the pendency of the proceedings below, the FCC concluded that an external, quasi-private system operator interconnecting separately owned or managed buildings from a single headend by leasing the cable from the telephone company does not need to obtain a franchise; that operator must obtain a franchise only if it interconnects separately owned or managed buildings with its own cable. *Telephone Company-Cable Television Cross Ownership Rules*, 7 F.C.C. Rcd. 300, 324-25 (1991) (holding that local telephone companies may act as common carriers for the delivery of video programming, but that neither the telephone company *nor* the party providing the programming need obtain a local franchise under the Cable Act). This decision further underscores the irrationality of the franchising requirement as imposed only upon external, quasi-private systems using their *own* cable.

It was well within the FCC's expertise to be aware of whatever dissimilarities or similarities might or would support Congress' classifications. The court of appeals did not ask the FCC to provide evidentiary proof of such similarities or dissimilarities, or to identify where in the Cable Act or its legislative history Congress "articulated" same; the court of appeals simply directed the FCC to supply a "reasoned justification in terms of *some* public purpose". App. at 4a (emphasis in original). Clearly, the court of appeals did not depart from this Court's precedents in determining that this case represented one of the rare instances in which Congress had engaged in a "wholly arbitrary act" in its classification scheme. *City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976).

In *Railway Express*, 336 U.S. at 110, this Court could conceive of a sufficient dissimilarity between the "nature or extent" of vehicle advertising used by self-advertisers versus general advertisers such that a municipal ordinance permitting the former but banning the latter appeared rationally to further the local interest in reducing distractions causing traffic problems. Here the FCC expressly stated it could *not* conceive of sufficient similarities or dissimilarities beyond those advanced by Chief Judge Mikva. As set forth *supra* at 15-16, the single "similarity" proffered by Chief Judge Mikva between nonexempt video distribution systems and traditional cable systems, *i.e.*, "larger system size", is also shared to an even greater degree between exempt wireless video distribution systems and traditional cable systems. Thus, being a shared characteristic rather than a distinguishing characteristic, "system size" cannot afford the rational basis for the varying classifications. Moreover, while the regulation in *Railway Express* would obviously reduce at least some of the distractions, here nonexempt facilities can become exempt facilities and remain the exact same size in doing so, thus easily defeating the alleged governmental interest sought to be served.

This case is also unlike *Lee Optical*, in which Petitioners contend this Court "imputed rationality to the process of legislative line drawing when the evidence of record did not definitively foreclose the existence of plausible facts supporting it". Pet. at 16-17. Here the "evidence of record" does "foreclose the existence of plausible facts" justifying the discriminatory classification. Again, the evidence of record proves only similarities, not dissimilarities between the exempt and nonexempt facilities. The evidence of record further proves that the only dissimilarity between traditional cable systems and the exempt and nonexempt facilities taken together is the use of the public rights-of-way. The record is extensive with respect to the public rights-of-way rationale, but is silent with respect to any other rationale for local jurisdiction over interstate communications media. The "plausible facts" posited by Chief Judge Mikva and now by Petitioners are foreclosed by this "evidence of record" since such facts would also have justified Congress' imposition of a franchising requirement upon wireless MDS operators who are in every instance of larger size on a community by community basis than their SMATV counterparts serving either single buildings, commonly-owned buildings, or separately-owned buildings.

Finally, Petitioners contend that this Court's rationality review in *Fritz* compels a reversal of the court of appeals decision here because Congress need not either "explicitly state or empirically verify" its reasons for a particular classification, but rather only a "plausible ground" need be conceived for it. Yet the court of appeals did not require verification or congressional explication. This is not legislation which is merely "unwise" or "unartfully drawn". *Fritz*, 449 U.S. at 175. This is legislation in which the alleged purpose for imposing local franchising on some but not all video distribution systems who do not use the public rights-

of-way is implausible and defies common sense. The court of appeals, consistently with this Court, simply refused to permit the rational-basis test to be deprived of any meaning, to become merely a "toothless" standard.

III.

THIS COURT NEED NOT GRANT REVIEW BECAUSE THE DISCRIMINATORY CLASSIFICATION DOES NOT SURVIVE APPLICATION OF A HEIGHTENED SCRUTINY STANDARD.

This Court should not grant the Petition because even overturning the D.C. Circuit's rational basis analysis would not save Section 602(6) from unconstitutionality. The failure of the statutory provision to pass the rational basis test rendered it unnecessary for the court of appeals to decide whether to apply a heightened level of scrutiny, as urged by Respondents in light of the First Amendment rights which are infringed by the Cable Act's prohibition against the provision of cable services without a franchise. App. at 32a. However, heightened scrutiny *is* appropriate in these circumstances, and the application of that test compels the invalidation of the discriminatory classification even if the rational basis standard is satisfied.

"Cable television . . . is engaged in 'speech' under the First Amendment . . . ." *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991). A government regulation prohibiting the operation of the facilities necessary to transmit cable programming "plainly implicates First Amendment interests." *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Moreover, the Constitution prohibits disparate treatment of similarly situated speakers. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978).

Section 602(6) favors some speakers over others by requiring a franchise of speakers who are materially indistinguishable from other speakers whom Congress exempted from the franchising requirement. Therefore,

the statutory provision is subject to heightened scrutiny, rather than the otherwise applicable rational basis test. *Police Department of Chicago v. Mosley,* 408 U.S. 92, 101 (1972). "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id.* "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown,* 447 U.S. 455, 461-62 (1980).[17]

As shown above, the distinction drawn by Congress is wholly irrational. Although the FCC repeated, without more, the justifications for that distinction as offered by Chief Judge Mikva, they do not satisfy the rational basis test, and therefore obviously cannot survive heightened scrutiny. The constitutional infirmity of the discriminatory classification under heightened scrutiny is particularly apparent in view of the requirement that the regulation be narrowly tailored to serve the purported governmental interest. If Congress were attempting to impose local regulation based on the size of the system and the number of subscribers served, it could have specified a certain numbers of subscribers that would trigger local

[17] *Carey* and the other cases cited impose heightened scrutiny when the government places burdens on speech occurring in a public forum, while the SMATV operators whose speech is burdened by the discriminatory classification here are seeking to speak on private property, *e.g.*, private apartment buildings. The scrutiny should be at least as strict in this case as in those involving public speaking, since governmental interference with speech which occurs on private property at the invitation of the owners and occupants of the property presents a more serious invasion of First Amendment rights than regulation of public forums. *See Stanley v. Georgia,* 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that [the government] has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.")

franchising requirements. Such a regulation would be so narrowly tailored as to constitute a perfect fit with the asserted governmental interest.

By contrast, Section 602(6) imposes local franchising requirements on a system which serves 75 subscribers in a group of separately-owned buildings, while exempting a system serving 1,000 subscribers in a single building. Moreover, a video provider can avoid franchising under the statutory provision, by installing separate headend facilities at each property served or by operating a wireless system, and thereby serving a potentially infinite number of subscribers. Obviously, Section 602(6) is not narrowly tailored to further the government's purported interest in imposing local regulation based on the size of the cable market served. Thus, the section is unconstitutional under the heightened scrutiny test.

The D.C. Circuit may have been hesitant to apply heightened scrutiny, despite the First Amendment interests at stake, in view of its finding that Respondents' substantive First Amendment challenge to the discriminatory classification was unripe. App. at 27a. However, that unripeness[18] does not affect the level of scrutiny to be applied when examining an equal protection claim that itself *is* ripe. The language of the equal protection cases applying heightened scrutiny makes clear that standard is applicable, even if the exact degree of the infringement on constitutional rights is not fully apparent. *See Mosley,* 408 U.S. at 101 (statutes "affecting" First Amendment interests subjected to heightened scrutiny); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 254 (1974) (heightened scrutiny applied to regulation which "impinged" on fundamental right); *Dunn v. Blumstein,* 405 U.S. 330, 339-42 (1972) (applying heightened

[18] Respondents respectfully disagree with the D.C. Circuit's ripeness analysis, but have not filed a cross-petition.

scrutiny to regulation which affected, but did not deter, exercise of constitutional right).

Following precedent of this Court, the D.C. Circuit properly found that the plain language of Section 602(6) "affects" and "impinges on" a fundamental right: "At the outset, we acknowledge that a First Amendment problem is posed." App. at 25a, citing *Leathers*, 111 S.Ct. at 1442. This indisputable finding requires application of heightened scrutiny, if the discriminatory classification passes the rational basis test. *Mosley*, 408 U.S. at 101. Since such classification fails under heightened scrutiny, this Court should refrain from exercising discretionary jurisdiction in a case where the outcome will remain unchanged.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied. The decision below is wholly consistent with this Court's precedent applying the rationality review standard and correctly determined that the discriminatory classification established in §602(6) of the Cable Act, 47 U.S.C. §522(6), violates the equal protection component of the Fifth Amendment.

Respectfully submitted,

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